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No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING and SCHMIDT, SMITH & RUSH,

Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent, Wold, and petitioner, Three Affiliated Tribes, agree that the sole issue on review is whether state court jurisdiction over petitioner's action is federally proscribed. Petitioner cannot sue a non-Indian in state court for damages on a state-created cause of action, Wold says, because that would require the state court to exercise jurisdiction that has either been expressly or implicitly denied to it by federal law. (Brief of Respondent, at 12-35.) Wold argues that two facts have special jurisdictional significance under federal Indian law and that the

presence of these facts require the automatic dismissal of claims such as petitioner's under the doctrine of federal preemption. These two facts, Wold says, divest the state court of subject matter jurisdiction whenever an Indian sues a non-Indian in state court on a claim arising on-reservation. (Brief of Respondent, at 9.)

Petitioner disagrees. Wold's conception of federal preemption in Indian law—requiring, as an apparent result, the exemption of non-Indians from suits by Indians—bears no resemblance at all to this Court's flexible application of federal preemption principles as a tool for adjusting the respective jurisdictional claims of states and tribes. *Rice v. Rehner*, 103 S. Ct. 3291, 3295 (1983). (Justice O'Connor, writing in her opinion for the majority, noted that "automatic" exemptions of reservation Indians from state authority are unusual.)

Wold's conception of states and tribes as virtually independent sovereigns—a tribe's sovereignty being automatically impugned if a state court hears a case arising under state law within a reservation—is not the present basis for this Court's administration of the principles of federal preemption in Indian law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). Petitioner submits that there is absolutely no reason to prohibit state court jurisdiction over a non-Indian defendant when such a restriction would serve no identifiable tribal or federal interest. *William v. Lee*, 358 U.S. 217 (1959).

ARGUMENT

I.

North Dakota Failed To Assume Any Jurisdiction Under Public Law 280.

Wold claims that the Act of August 15, 1953, 67 Stat. 588, hereinafter called Public Law 280, authorized North Dakota to adjust its judicial jurisdiction so as to preclude Indians from suing non-Indians in state court if the state cause of action involved arose on-reservation. (Brief of Respondent, at 34-35.) Wold does not dispute that the Supreme Court of North Dakota deemed the state's judicial authority to extend to Indians' suits against non-Indians for damages, arising on- or off-reservation, despite Public Law 280's enactment. (Brief of Respondent, at 29-30.) However, Wold argues that North Dakota, consistent with the grant of federal jurisdictional power available to it under Public Law 280, by state legislative action extinguished or disclaimed any independent state judicial jurisdiction over Indian claims against non-Indians. Consequently, Wold urges this Court to affirm the state court's decision below because that court correctly concluded that North Dakota, by enacting Chapter 27-19 of the N.D.C.C. had, as an exercise of federally delegated authority, extinguished all the state's judicial authority over Indian claims arising on-reservation. (Brief of Respondent, at 24-35.)

Petitioner submits that both the legislative history of the federal statute and the plain terms of that act demonsrate clearly that Public Law 280 cannot serve as a tool for the renunciation by a state legislature of its judicial

jurisdiction. First, the legislative record of Public Law 280 shows the Congressional purpose behind that statute to be an orderly transfer of limited federal authority to the states under specified conditions. (Brief of Petitioner, at 16-27.) This Court has recognized that a state's adequate acceptance of such federal authority would enable the state to exercise jurisdiction in certain new subject matter areas where it would otherwise be preempted from doing so. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 479 (1979). State judicial authority, which exists independently of the federal government as an aspect of state sovereignty, would thus be enlarged to embrace these new subject matter areas. Hazard and James, *Civil Procedure* § 12.12 (2d ed. 1977). Public Law 280, in this regard, is fundamentally no different than federal legislation transferring authority to states to act in an area, such as interstate commerce, where they were otherwise preempted. *Re Van Vliet,* 43 F. 761 (C.C.E.D. Ark. 1890).

Second, this Court has given effect to Congress' purpose behind Public Law 280 by construing Section 7 of that statute to require affirmative state legislative action that obligates the state to assume civil or criminal jurisdiction over the subject matter areas offered under the act. *Washington v. Yakima Indian Nation,* 439 U. S. 463, ftn. 30 at 486 (1979). This Court has consequently disallowed state legislation that imposed prior conditions, such as tribal consent, on the assumption of Public Law 280 jurisdiction, as manifestly failing to evidence the necessary unequivocal intent to assume such jurisdictional responsibilities. *Kennerly v. District Court,* 400 U. S. 423, 427 (1971). Wold does not dispute that North Dakota conditioned the assumption of any Public Law 280 jurisdiction

on tribal consent. (Brief of Respondent, at 26.) However, Wold argues that the the North Dakota state legislature was motivated to enact Chapter 27-19 of the N.D.C.C. in its peculiar form out of respect for tribal sovereignty. (Brief of Respondent, at 26-27.) However, the motivations of state legislators—whether they be good or bad—are irrelevant here in determining whether the requirements of Public Law 280 were met.

Respondent asks this Court to ignore the fact that North Dakota never did assume any jurisdiction under Public Law 280—yet sustain this statute as a suitable method for realizing both the implicit and express purposes of Public Law 280. Wold contends that Chapter 27-19 is fundamentally identical with another option state's—Washington's—response under Public Law 280. (Brief of Respondent, at 28.)

Petitioner submits that a comparison of the respective responses of North Dakota and Washington to Public Law 280 reveals not the similarity—but the disparity—of the two approaches. The state of Washington enacted under Public Law 280's authority a jurisdictional statute assuming only partial subject matter and geographic jurisdiction over reservations within that state. The exercise of that jurisdiction was predicated upon the pattern of land tenure within the reservations—Washington assumed full civil and criminal jurisdiction over fee patent lands within the reservation but refrained from exercising such jurisdiction as to the trust lands therein without Indian consent.

This Court, on review, held that Washington's statute constituted an assumption of Public Law 280 juris-

diction because the factual bases for that jurisdiction complied with the Congressional purpose behind the federal statute. The state statute, this Court found, eliminated at least in part the law enforcement hiatus on-reservation. That statute also preserved, as a factual and jurisdictionl distinction, the status of trust lands as remaining free from state regulation. *Washington v. Yakima Indian Nation,* 439 U. S. 463 (1979).

This Court upheld both Washington's partial assumption of jurisdiction as consistent with the requirements of Section 7 of Public Law 280 as well as the rationality of the factual predicates on which Washington conditioned the exercise of that jurisdiction. *Id.,* at 498-500.

North Dakota's statute, Chapter 27-19, shares nothing in common with the Washington statute sustained under Public Law 280 in *Yakima.* Wold would have this Court extend the *Yakima* rationale to sustain under Public Law 280's authority a jurisdictional classification that has as its result the avoidance—not the assumption—of any of the jurisdictional responsibilities offered by Congress under that statute. This Court has already decided, petitioner submits, that such a jurisdictional classification would not evidence the affirmative and responsible legislation required by Section 7 of Public Law 280. *Washington v. Yakima Indian Nation,* 439 U. S. 463, ftn. 30 at 486 (1979).

North Dakota's statute, as construed by the state supreme court, denies state jurisdictional authority based on essentially nominal facts that are demonstrably unrelated to the historical concepts that define state judicial authority in Indian affairs. Washington's statute affirms

the exercise of jurisdiction based on facts that relate directly to concepts that define the respective spheres of state and tribal authority. *Yakima,* at 502. By contrast, the state supreme court below assumes that state courts, under Public Law 280, are precluded from hearing suits against non-Indians.

The effect of this decision is to cut off state court remedies against non-Indians that this Court has always viewed as available to Indian people. Both petitioner and the United States, as Amicus Curiae, have pointed to decisions of this Court spanning nearly a century acknowledging the Indians' right to sue non-Indians in state court to protect their property rights. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 6-15.)

North Dakota claims federal authority to legislate against, not consistent with, the general principle of federal Indian law that Indians have the capacity to sue non-Indians in state court absent some overriding tribal or federal interest that precludes state court jurisdiction. Cohen, *Handbook of Federal Indian Law,* at 162 (University of New Mexico Press, 1971 Reprint). That Public Law 280 has not changed this rule is evidenced by this Court's decisions affirming Indians' right to sue non-Indians in the state courts of Public Law 280 and non-Public Law 280 states alike. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 15-25.)

The state statute, as construed by the North Dakota Supreme Court, does not constitute a realization of the Congressional purposes evident in Public Law 280 as claimed by Wold. Congress did not consent to an exer-

cise of federal jurisdiction that completely disables Indians from suing non-Indians in state court for state remedies.

II.

Congress Has Not Preempted State Judicial Authority Over Petitioner's Action.

Wold argues that even if Public Law 280, as construed by the state court, does not prohibit state court jurisdiction over petitioner's action, principles of federal preemption nonetheless required the state court to dismiss this action. (Brief of Respondent, at 12-23.)

Petitioner disagrees. Federal policy and law favor the right of Indians to sue non-Indians in state court to protect their rights if no overriding tribal or federal interests are implicated in such a suit. Cohen, *Handbook of Federal Indian Law*, at 162 (University of New Mexico Press, 1971 Reprint). Commentators agree that the recognition of Indians' legal capacity to sue non-Indians in state court is an important component of the civil rights of Indian people. Brown, *The Indian Problem and the Law*, 39 Yale L. J. 307 (1930). Federal Indian law—contrary to Wold's assumption—has recognized that state courts provide an important forum for the protection of Indian rights from non-Indians. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 15-25.)

Wold makes two arguments in support of the proposition that federal preemption precludes state court jurisdiction over this action:

First, Wold claims there must be an express federal grant of jurisdiction conferring authority on state courts over Indians' suits against non-Indians thus enabling them to hear petitioner's action. (Brief of Respondent, at 6.) Second, Wold claims that allowing Indians access to state courts as plaintiffs to sue non-Indians would defeat the supposed federal goal of assimilation under Public Law 280. (Brief of Respondent, at 33.)

Petitioner submits that under the governing principles of federal preemption in Indian law the presumption runs in favor of state court jurisdiction over state-created causes of action against non-Indians. It has always been presumed that states have a clear interest in regulating the conduct of non-Indians on-reservation either legislatively or judicially. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 179 (1973). Other considerations support this presumption aside from the mere fact the defendant is non-Indian. Here, an Indian sued a non-Indian under state law in state court for damages. Such cases generally raise only issues of local law and procedure that are outside any federal concerns. *DeCanas v. Bica*, 424 U. S. 351, 363 (1976).

Petitioner recognizes that the presumed state interest in regulating non-Indian conduct can be overcome. See *New Mexico v. Mescalero Apache Tribe*, 103 S. Ct. 2378, 2385 (1983). If there were a clear "Congressional plan" to preempt such state authority, either in favor of tribal regulation or federal authority, then such a presumption would have to give way. *Rice v. Rehner*, 103 S. Ct. 3291 (1983). However, petitioner has found no such plan, nor has respondent pointed to any plan, that precludes state

court jurisdiction over non-Indians for claims arising on-reservation. Indeed, petitioner submits that both Congress and this Court assumed and expected Indians to be able to sue in state court for state remedies against non-Indians. (Brief of Petitioner, at 27-32.)

Even before attaining citizenship Indians were regarded in federal law as having the legal capacity to sue in state courts to protect their rights. Cohen, *Handbook of Federal Indian Law*, at 162 (University of New Mexico Press, 1971 Reprint). The convergence of these two principles—the presumption of state authority over non-Indians and the capacity of Indians to sue in state court—established that there is no federal bar to or preemption of state court jurisdiction of a suit against a non-Indian for damages arising from a state-created cause of action. (Brief of the United States, as Amicus Curiae, at 6-25.)

Wold's contention that somehow state court jurisdiction over a suit against a non-Indian has been federally proscribed necessitates a showing of more facts than that an Indian is the plaintiff and that he or she is suing on a state claim that arose on-reservation. Federal preemption is a tool for reconciling the competing rights and interests in a federal system—of which tribes and states are component parts. Sovereignty—tribal and state—is restricted only in cases of clearly improper exercise. This Court declared:

> It is not . . . mere possibility of inconvenience in the exercise of powers but an immediate Constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty.

Goldstein v. California, 412 U. S. 546, 555 (1973), *citing* The Federalist No. 32, p. 243. (This Court in *Goldstein*, by a 5-4 vote, held that Article I, § 8, cl. 8 does not expressly or by inference vest all power to grant copyright protection exclusively in the federal government.)

Wold's second argument for barring petitioner's action likewise has no substance:

> If Indians are allowed access to state courts for all purposes as plaintiffs and may escape the power of that same court when they are defendants, what incentive remains for the Indian tribes to ever enter the non-Indian world as full fledged members of that world? Having the best of the judicial world they will remain forever a people dependent upon the federal guardian. (Brief of Respondent, at 33.)

The answer is that states have an identifiable interest under federal law in regulating the conduct of non-Indians on-reservation. By the same token, tribes have an identifiable interest in regulating the conduct of Indians on-reservation. The underlying rationale supporting this Court's acknowledgement of these respective authorities is not simply deference to tribal or state sovereignty, but a concern for the defendant's rights as well. Judicial jurisdiction requires the application of the law that must govern the case, and that law should be one that the defendant generally considers as governing his or her conduct. This principle, along with considerations of convenience and other practical matters, largely explains the result in *Williams v. Lee*, 358 U. S. 218 (1959). This Court held there that the proper forum for adjudication of an action against an Indian on-reservation is tribal, not state, court. The identity of the plaintiff, a non-In-

dian, was deemed irrelevant in light of the tribal and federal interests at stake. *Id.*, at 222-223. Conversely, similar policies underlie authorizing petitioner's action against respondent, a non-Indian, who is also a non-resident of the reservation. The state court is at home in applying the state law that governs his conduct and he is not required to travel to a foreign forum. Hazard and James, *Civil Procedure*, § 12.29 (2d ed. 1977).

By comparison, Wold's conceptualization of jurisdiction renders reservations and states isolated territories where deference to state or tribal sovereignty requires the sacrifice of the Indian right to access to state court. (Brief of Respondent, at 11.) Wold seems to say that it is paradoxical, but true, that his territorial theory of tribal sovereignty requires the restriction of Indian rights. Consequently, Wold concedes that an Indian may sue a non-Indian in state court as a matter of right for damages off-reservation, but that the Indian is completely foreclosed from doing so if the action arose on-reservation. (Brief of Respondent, at 20.)

The only response possible to Wold's view is that federal Indian law has progressed far beyond this impoverished framework for jurisdiction. This Court has rejected rigid jurisdictional rules that, while they would ease litigation, would not promote the "flexible consideration of the federal, state, and tribal interests at issue." *Ramah Navajo School Board v. Bureau of Revenue*, 457 U. S. 3394, 3403 (1982).

III.

Reversal Of The State Court's Decision Is The Proper Disposition In This Matter.

Petitioner, Three Affiliated Tribes, has requested this Court to reverse the state court decision below. (Brief of Petitioner, at 48.) However, the United States, as Amicus Curiae, has requested this Court to vacate the state supreme court's decision and remand it for further proceedings not inconsistent with this Court's mandate.

Petitioner considers reversal to be the proper remedy because the record below, including the state supreme court's decision, clearly establishes that the state court and the parties to this proceeding view federal law as the basis for barring petitioner's claim in state court. The state court viewed Public Law 280 as empowering North Dakota to bar Indian suits against non-Indians in state court:

> The people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. *Three Affiliated Tribes v. Wold Engineering*, 321 N. W. 2d 510, 513 (1982).

The record below, as well as the past decisions of the state supreme court, reveal that there is no ambiguity as to the ground for decision by the state court. Petitioner has reviewed the declarations of the state supreme court that North Dakota has no policy against Indians suing non-Indians in state court for a remedy absent the perceived federal bar contained in Public Law 280. (Brief of Petitioner, at 11-14.) The Eighth Circuit Court of Ap-

peals ruled recently that given the past state supreme court decisions, North Dakota has no independent policy against Indians suing in state court. *Poitra v. Demarrias*, 502 F. 2d 23, 27 (8th Cir. 1974). This Court has consistently adhered to the principle that it is for the respective courts of appeals to determine the state law within their respective jurisdictions. *Bank of America National Trust v. Parnall*, 352 U. S. 29, 34 (1956).

This Court has recognized that deference to state authority, as well as principles of federalism, may sometimes require the vacation and remand of a state court's decision for further proceedings. Note, *Supreme Court Review of State Court Questions Involving Multiple Questions*, 95 U.Pa. L. Rev. 764 (1947). However, the state supreme court here has made it clear by repeated decisions that there is no state bar or policy against petitioner's action in state court—but solely a federal bar.

Consequently, there is no ambiguity as to the basis or ground for the state court's decision, and a remand for clarification of what the state law is on the subject is unnecessary. See *DeCanas v. Bica*, 424 U. S. 351, 363 (1976). The North Dakota Supreme Court has already construed Chapter 27-19 of the N.D.C.C. with respect to its own state policy. *Cf., State Tax Commission v. Van Cott*, 306 U. S. 605 (1939). (This Court vacated the decision of the Utah Supreme Court and remanded the case so that the state court could construe the Utah income tax law apart from any question of federal constitutional immunity.)

CONCLUSION

Petitioner submits that Wold has not shown that either federal law or policy bars petitioner's action in state court.

Respectfully submitted,

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